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Supreme Court, U.S.
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No. 83-1858

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES M. MURPHY,
Petitioner
v.
THE STATE OF TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the holding of the Court of Criminal Appeals is supported by an adequate and independent state ground barring this Court's review of the federal double jeopardy questions raised by petitioner.

2. Whether the Texas system for trying contempt cases against attorneys violates the Double Jeopardy Clause of the Fifth Amendment.

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JAMES M. MURPHY,

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THE STATE OF TEXAS,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of Texas, respectfully requests that the Court deny the petition for writ of certiorari, which seeks review of the opinion of the Texas Court of Criminal Appeals in Ex parte Murphy, reported at 669 S.W.2d 320. The Court's mandate in that case was issued June 14, 1984.

STATUTORY PROVISIONS INVOLVED

1. Texas Code of Criminal Procedure Annotated, Article 27.05 (Vernon Supp. 1984):

A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:

(1) resulted in acquittal;

(2) resulted in conviction;

(3) was improperly terminated; or

(4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

2. Texas Code of Criminal Procedure Annotated, Article 27.06 (Vernon Supp. 1984):

Every special plea shall be verified by the affidavit of the defendant.

3. Texas Revised Civil Statutes Annotated, Article 1911a, Section 2(c)(Vernon Supp. 1984):

Provided, however, an officer of a court held in contempt by a trial court shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred.

STATEMENT OF THE CASE

Petitioner was attorney of record for Alfred Ray, the defendant in a felony case scheduled for

a pre-trial hearing on August 12, 1983, in the 297th District Court of Tarrant County, Texas. Petitioner failed to appear at that hearing and likewise failed to appear at the trial setting scheduled in the same court ten days later, on August 22nd. As a consequence of these failures to appear, the court found petitioner in contempt of court the next day, assessed his punishment at 72 hours in jail and a $500.00 fine, and issued a warrant for his arrest.

Three days later petitioner was arrested pursuant to the warrant. However, in accord with Tex. Rev. Civ. Stat. Ann. art. 1911a, § 2(c) (Vernon Supp. 1984), he promptly filed a motion asking that he be released on his personal recognizance and requesting that a judge other than the offended judge be appointed to determine his guilt or innocence. Petitioner's motion was granted, the Honorable Charles W. Lindsey was appointed to hear his case, and petitioner was given timely notice of the date and purpose of the hearing.

Petitioner appeared and presented evidence at the hearing, but at no time did he file a special jeopardy plea supported by affidavit, as required by Tex. Code Crim. Proc. Ann. arts. 27.05, 27.06 (Vernon Supp. 1984). At the conclusion of the hearing he was found guilty of two counts of contempt by Judge Lindsey, who sentenced him to a fine of $150.00 on the first count and a fine of $300.00, plus one day of confinement, on the second count.

In an original writ of habeas corpus in the Texas Court of Criminal Appeals petitioner contended that double jeopardy principles provided a barrier to Judge Lindsey's findings. It is that court's denial of relief which petitioner now asks this Court to review.

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAIVED HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE BY FAILING TO COMPLY WITH THE STATE STATUTORY REQUIREMENT THAT THOSE RIGHTS BE URGED PRIOR TO TRIAL IN A WRITTEN MOTION SUPPORTED BY AN AFFIDAVIT.

Like other valuable constitutional rights, the bar of double jeopardy may be waived. Jeffers v. United States, 432 U.S. 137, 150-154 (1977). It follows that a state may require a defendant to plead and prove his jeopardy defense in a strictly prescribed manner or else forfeit his right to assert it at a later time. See Jeffers, supra, 432 U.S., at 152; Williams v. Florida, 399 U.S. 78, 81 (1970)(defendant may be required to give the state pre-trial notice of alibi defense and supporting witnesses; failure to do so waives his right to present testimony from those witnesses).

Accordingly, numerous jurisdictions have held that their statutory or quasi-statutory requirements for pleading and proving a double jeopardy defense are to be strictly enforced, and the failure to comply with those requirements operates as a waiver of the right to complain of a double jeopardy violation. See, e.g., United States v. Perez, 565 F.2d 1227, 1232 (2d Cir. 1977); Drakes v. State, 400 So.2d 487 (Fla. App. 1980); Carbonneau v. Warden of Nevada State Prison, 634 P.2d 1197 (Nev. 1981); People v. Fairchild, 52 Cal. App. 2d 831, 62 Cal. Rptr. 535 (1967), cert. denied, 391 U.S. 955 (1968); Anthony v. State, 273 So.2d 222 (Ala. Crim. App. 1972), writ denied, 273 So.2d 227, followed in Steward v. State, 314 So.2d 313 (Ala. Crim. App. 1975), writ denied, 314 So.2d 317. Cf. People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134 (1979).

In Texas the bar of double jeopardy must be urged prior to trial by a verified written plead-

ing. Tex. Code Crim. Proc. Ann. art. 27.05, 27.06, supra. If a criminal defendant fails to file such a pleading, he waives his right to raise constitutional double jeopardy claims on appeal. Dedmon v. State, 478 S.W.2d 486, 489 (Tex. Crim. App. 1972); Shaffer v. State, 477 S.W.2d 873, 875 (Tex. Crim. App. 1972). The court below relied upon these statutory procedures in overruling petitioner's double jeopardy contentions. Respondent contends that it was constitutionally authorized to do so.

This Court has "recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring [its] review of a federal question." Hathorn v. Lovorn, 457 U.S. 255, 262 (1982). However, the state procedural rule must be "'strictly or regularly followed'" in order to be adequate. Id., at 263, quoting from Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

Except in one narrowly-defined situation, the Texas Court of Criminal Appeals has strictly followed the statutory requirements of Articles 27.05 and 27.06 of the Texas Code of Criminal Procedure. The Court declines to apply these statutes only when the alleged prior conviction or acquittal was before the same judge in the same trial court as the subsequent trial. E.g., Black v. State, 143 Tex. Crim. 318, 320, 158 S.W.2d 795, 796 (1942); Duckett v. State, 454 S.W.2d 755, 758, n.2 (Tex. Crim. App. 1970);[1] Ex parte Scelles, 511 S.W. 2d 300, 301 (Tex. Crim. App. 1974); Ex parte Jewell, 535 S.W.2d 362, 365 (Tex. Crim. App. 1976). Otherwise, the statutes are strictly enforced. E.g., Dedmon v. State, supra; Shaffer v. State, supra; Ex parte Murphy, supra. Thus the state procedural rules upon which the lower court

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[1] The pertinent holding of Duckett is clarified in Ex parte Scelles, infra, 511 S.W.2d at 301, n. 3.

relied are applied "evenhandedly to all similar claims"; they are not enforced "only irregularly". Hathorn, supra, 457 U.S., at 263, 264-265. It follows that the Texas court properly overruled petitioner's double jeopardy contentions because of his noncompliance with a Texas procedural rule. That court's action therefore constitutes an independent and adequate state ground barring this Court's review of the petitioner's double jeopardy claim. Hathorn, supra, 457 U.S., at 262.

II.

THE TWO-STAGE TEXAS SCHEME FOR DETERMINING WHETHER ATTORNEYS ARE IN CONTEMPT OF COURT DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

It is clear that the order holding petitioner in contempt was not remedial or coercive but punitive; hence, the contempt was criminal rather than civil. Cheff v. Schnackenberg, 384 U.S. 373, 377 (1966); Shillitani v. United States, 384 U.S. 364, 368-369 (1966). And it appears that the pro-

visions of the Double Jeopardy Clause apply to criminal contempt actions as they do to other criminal cases. See Colombo v. New York, 405 U.S. 9, 11 (1972); Menna v. New York, 423 U.S. 61, 62, n.1 (1975). However, the double jeopardy barriers of the Constitution do not govern petitioner's case, for, as this Court's holdings make evident, he was placed in jeopardy only once.

Petitioner's double jeopardy contention is controlled by this Court's holding in Justices of Boston Municipal Court v. Lydon, 104 S.Ct. 1805 (1984). In Lydon, the defendant was arrested for breaking into an automobile, then convicted in a bench trial before a Boston municipal judge. He sought a de novo jury trial in accord with Massachusetts law and was released on a personal recognizance bond pending trial. Before that second trial he moved to dismiss the charge, contending that no evidence of intent had been introduced at his first trial, and that retrial was accordingly barred by the holdings of Burks v.

United States, 437 U.S. 1 (1978). Lydon, supra, 104 S.Ct., at 1818. In rejecting Lydon's contention, the Court held that the bar of the Double Jeopardy Clause does not apply unless jeopardy has both attached and terminated. Id., at 1813-1814. And it agreed that Lydon's "'second stage proceeding can be regarded as but an enlarged, fact- sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more -- rather than less -- of the process normally extended to criminal defendants in this nation.'" Id., at 1814, quoting from Lydon v. Justices of Boston Municipal Court, 598 F.2d 1, 12 (1st Cir. 1982)(Campbell, J., dissenting). The Court concluded that neither Lydon's initial conviction in his bench trial nor any other aspect of the proceedings caused jeopardy to terminate; hence, his trial de novo was not barred.

Petitioner was convicted and sentenced in accord with the procedures established by Tex. Rev.

Civ. Stat. Ann. art. 1911a, § 2(c), supra. See Manness v. Meyers, 419 U.S. 449, 456 (1975). That statute provides that when an officer of the court is held in contempt, he may file a motion requesting release upon his personal recognizance and a determination of his guilt or innocence by a judge other than the offended magistrate. That second judge also has the power to alter the sentence originally imposed on the contemnor by the offended judge. See, e.g., Manness, supra, 419 U.S., at 457; Ex parte Curtis, 568 S.W.2d 363, 365 (Tex. Crim. App. 1978).

Thus, when an officer of a Texas court invokes the permissive provisions of Section 2(c), he is in virtually the same position as a defendant who elects a bench trial in the "two-tier" system used in the municipal courts of Boston. Lydon, supra, 104 S.Ct. at 1807-1808. Like the Boston defendant, if the Texas attorney is dissatisfied with the initial judgment and sentence im-

posed upon him, he is absolutely entitled to a trial de novo before a different fact-finder.

There is only one significant difference between the Texas contemnor and the Boston defendant, but it is irrelevant to the double jeopardy issues petitioner raises. This petitioner had no right to a jury, while the defendant in Lydon had such a right, which he could waive. Id., at 1808, n.2. But because petitioner's maximum possible sentence was six months in jail (plus a fine), he was properly deprived of a jury trial by the Texas statute. Art. 1911a, supra, § 2(a); Cheff v. Schnackenberg, supra. Also, it is well established that the Double Jeopardy Clause impinges on both jury trials and those before the court. United States v. Jorn, 400 U.S. 470, 479 (1971); Serfass v. United States, 420 U.S. 377, 388 (1975). Therefore, the distinction between the Boston municipal court scheme and these Texas contempt procedures is of no significance for double jeopardy purposes.

Like the criminal defendants in Boston's municipal courts, this petitoner has been given a second opportunity to have his guilt and punishment determined by an independent fact-finder. He has taken advantage of that opportunity and thereby received "more -- rather than less -- of the process normally extended to criminal defendants in this nation." Lydon, supra, 104 S.Ct., at 1814.

III.

THE TWO-STAGE TEXAS SCHEME PROVIDES ESSENTIAL DUE PROCESS SUPPORT FOR THE CONSTITUTIONAL NECESSITY OF A VIGOROUS INDEPENDENT BAR IN OUR SYSTEM OF JUSTICE.

The extra procedural protection Texas gives to contemnors who are officers of the court can have but one purpose: to assure the "vigorous, independent bar... indispensable [to] our system of justice." In re McConnell, 370 U.S. 230, 236

(1962), quoted with approval in Curtis, supra, 568 S.W.2d, at 366. Accord, Taylor v. Hayes, 418 U.S. 488 (1974); Ex parte Martin, 656 S.W.2d 443 (Tex. Crim. App. 1982).

In Taylor, this Court held that in some cases due process required that an attorney-contemnor be tried before a second judge. To its credit, the State of Texas has assured that it is always the attorney himself who decides whether the ultimate fact-finder is the offended judge or another magistrate. But if this petitioner's double jeopardy contention is sustained, the respondent will be required to alter this commendable practice that conforms so well to the requirements of due process: It will be Texas rather than petitioner that is forced to the Hobson's choice between two constitutional protections. See Ullman v. United States, 350 U.S. 425, 428 (1956)("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.").

IV.

THE PETITIONER'S DOUBLE JEOPARDY CONTENTION DOES NOT PRESENT A SUFFICIENTLY IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Yates v. United States, 355 U.S. 66, 75 (1957), the Court held that it was within a trial court's power to find a criminal contemnor guilty on one day and postpone imposition of sentence to a later day. The Court held that it was likewise permissible for the trial court to "first apply coercive [i.e., civil contempt] remedies in an effort to persuade a party to obey its orders, and only make use of the more drastic criminal sanctions when the disobedience continues." Id., at 75. Surely, the distinction between those procedures and the procedures followed in petitioner's case is "entirely formal." Id.

And in Ex parte Howell, 488 S.W.2d 123 (Tex. Crim. App. 1972), the contemnor-attorney was found

guilty of contempt under Art. 1911a, supra, and, the trial judge followed the procedures which petitioner now challenges. In his habeas corpus petition before the Texas Court of Criminal Appeals, Howell argued that the statutory scheme violated his right to due process of law and equal protection of the laws because it "provide[d] for punishment prior to a determination of guilt or innocence." Howell, supra, 488 S.W.2d, at 127. The Texas Court rejected this contention. Id. Howell's appeal to this Court was dismissed for want of a substantial federal question. Howell v. Jones, 414 U.S. 803 (1973). Of course, this was a decision of the merits of the case. Hicks v. Miranda, 422 U.S. 332, 343-345 (1975); Howell v. Jones, 516 F.2d 53 (5th Cir. 1975), cert. denied, 424 U.S. 916 (1976).

Respondent contends that the double jeopardy contention of this petitioner is as insubstantial as the due process and equal protection claims of

Howell. See Howell v. Jones, supra, 516 F.2d at 57.

CONCLUSION

By his failure to comply with a valid state statute, petitioner has waived his right to complain of any violation of his rights under the Double Jeopardy Clause. A comparable double jeopardy claim has recently been decided by this Court, and it is contrary to his contentions. The statutory scheme which is the true object of his complaint is a valuable protector of the due process rights of attorneys and their clients. And the double jeopardy questions he raises are so insubstantial as to be unworthy of this Court's discretionary jurisdiction. For these reasons, respondent asks that the writ of certiorari not issue to review the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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